

CLERK COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 81

THE UNITED STATES OF AMERICA, APPELLANT

vs.

THE WAYNE PUMP COMPANY, GILBERT AND BARKER
MANUFACTURING COMPANY, TOKHEIM OIL TANK
AND PUMP COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS

FILED APRIL 24, 1942

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 81

THE UNITED STATES OF AMERICA, APPELLANT

vs.

THE WAYNE PUMP COMPANY, GILBERT AND BARKER
MANUFACTURING COMPANY, TOKHEIM OIL TANK
AND PUMP COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS

INDEX

	Original	Print
Record from D. C. U. S., Northern District of Illinois.....	1	1
Caption [omitted in printing].....	1	1
Docket entries.....	2	1
Indictment.....	6	4
Demurrer of Defendant Tokheim Oil Tank & Pump Co.....	26	19
Joint and several demurrer of The Wayne Pump Com- pany, et al.....	29	20
Joint and several demurrer of Gilbert & Barker Manu- facturing Company et al.....	32	22
Joint and several demurrer of Defendant Veeder-Root, Inc., et al.....	36	23
Joint and several demurrer of Gasoline Pump Manufac- turers Association et al.....	39	25
Opinion of Judge Sullivan.....	42	27
Order sustaining demurrers.....	56	43
Petition for appeal.....	57	43
Assignments of error.....	85	44
Order allowing appeal.....	87	45
Citation [omitted in printing].....	92	46
Præcipe of transcript of record.....	93	46
Clerk's certificate [omitted in printing].....	95	46
Statement of points to be relied upon and designation of record to be printed.....	97	47
Order postponing further consideration of question of juris- diction.....	99	48

1 [Caption omitted.]

2 In United States District Court, Northern District
of Illinois

THE UNITED STATES

vs.

THE WAYNE PUMP COMPANY, GILBERT AND BARKER MANUFACTURING COMPANY, TOKHEIM OIL TANK AND PUMP COMPANY, VEEDER-ROOT INCORPORATED, GASOLINE PUMP MANUFACTURERS ASSOCIATION, B. F. GEYER, S. C. HOPE, G. DENNY MOORE, G. H. ANTHONY, J. H. CHAPLIN

F. U. S.: J. Albert Woll.

1941

Jan. 31—Filed Indictment summons to issue for corporations and bench warrants for individual debts and bonds for individual debts, fixed at \$1,000.00. Woodward, J.

Jan. 31—Issued (5) summons and (5) bench warrants.

Feb. 4—Issued certified copy of Indictment to Tokheim Oil Tank and Pump Co.

Feb. 6—Filed Bond (Tokheim Oil Tank and Pump Co.) Surety Co.

Feb. 6—Filed Bond (Wayne Pump Company) Surety Co.

Feb. 6—Filed Bond (B. F. Geyer) Surety Co.

Feb. 8—Issued certified copy of Indictment to Atty. General Swanson.

Feb. 10—Order Clerk to return bond in amount of \$2,000 erroneously filed on behalf of Wayne Pump Co. as an appearance bond in this cause and cause 32598. Barnes, J.

Feb. 10—Filed receipt of Charles L. Byron.

Feb. 11—Filed Bond (Denny Moore) Surety Co.

Feb. 12—Filed Bond (Graham Anthony) Surety Co.

Feb. 12—Filed Bond (J. H. Chaplin) Surety Co.

Feb. 14—Filed Appearance—Gilbert & Barker Mfg. Co. and S. C. Hope, Winston Strawn and Shaw, James H. Winston and John C. Slade of counsel.

Feb. 12—Filed Appearance—The Wayne Pump Co., a Corp., and B. F. Geyer—Edward R. Johnston and Chas. L. Byron and Howard Somervell, Attys.

- Feb. 12—Filed Appearance—Veeder-Root, Inc., G. H. Anthony and J. H. Chaplin—James M. Carlisle and Arthur A. Lytton, Attys.
- Feb. 12—Filed Appearance—The Wayne Pump Co., a Corp., and B. F. Geyer—Edw. R. Johnston, Chas L. Byron and Howard Somervell, Attys.
- Feb. 20—Filed Bond (S. C. Hope) Surety Co.
- Feb. 24—Filed Appearance—Tokheim Oil Tank and Pump Co.—Ballard Moore, Harold W. Norman, and Louis F. Niezer, Attys.
- Feb. 24—Order Clerk of U. S. Court to release to Tokheim Oil Tank and Pump Co. a bond in sum of \$1,000 inadvertently filed by said company. Sullivan, J.
- Feb. 25—Filed Appearance—Gasoline Pump Manufacturers Association and G. Denny Moore, Harold W. Norman, Atty.
- Feb. 27—On mo. of defts, Attys., cause contd. for plea to March 31, 1941. Sullivan, J.
- Mar. 17—Filed (5) Bench Warrants ret'd. unex. bonds given.
- Mar. 17—Filed Summons ret'd. unex. (5).
- Mar. 29—Filed Withdrawal and Substitution of Attorneys—Barry, Gilbert, & Cassels, Potter & Bentley, Attys.
- Mar. 29—Filed Demurrer of Tokheim Oil Tank and Pump Company, Ballard Moore, Louis F. Niezer, and Harold W. Norman, Attys.
- Mar. 31—Filed Appearance of Harold F. McGuire as add'l counsel of Veeder-Root, Incl., G. H. Anthony, and J. H. Chaplin, defts.
- Mar. 31—Filed Joint and Several Demurrer of Defts. The Wayne Pump Company and B. F. Geyer by Edward R. Johnston, Charles L. Byron, and Howard Somervell, Attys.
- Mar. 31—Filed Joint and several demurrer and motion to quash of Veeder-Root, Incorporated, G. H. Anthony, J. H. Chaplin by Harold F. McGuire, James M. Carlisle, and Arthur S. Lytton, their Attys.
- 4 Mar. 31—Filed Joint and Several Demurrer of Defts. Gilbert & Barker Manufacturing Company, a Corp., and S. C. Hope by James H. Winston, John C. Slade, and George W. Ott, their Attys.
- Mar. 31—By agreement contd. for pleas as to defts. Gasoline Pump Mfg. Ass'n. and G. Denny Moore to April 18, 1941, Lv. given defts. to file Brief in 30 days and Gov't. to file reply brief 30 days thereafter. Sullivan, J.

- Apr. 4—Filed Joint And Several Demurrer Of The Defendants Gasoline Pump Mfg. Association (an unincorporated association) and G. Denny Moore—Barry Gilbert, Atty. for defts.
- Apr. 7—Rule on defts. Gasoline Pump Mfg. Assn. and G. Denny Moore to file briefs in support of demurrer in 30 days and Gov't. to file reply brief 30 days thereafter. Sullivan, J.
- Apr. 30—Filed Brief in Support of Demurrers to both Indictments filed by the Wayne Pump Co., B. F. Geyer, Tokheim Oil Tank and Pump Company, Veeder-Root, Inc., G. H. Anthony, J. H. Chaplin, and Brief of Gasoline Pump Manufacturers Association and G. Denny Moore in Support of Demurrer to First Indictment—by Attys. for the Defts.
- Apr. 30—Filed Notice of Filing and Proof of Service, Johnston, Byron, and Sommervell, Attys. for Wayne Pump Co. and B. F. Geyer—Harold W. Norman, L. F. Niezer, and B. Moore, Attys. for Tokheim Oil Tank and Pump Co.—H. F. McGuire, J. M. Carlisle, A. S. Lytton, Attys. for Veeder-Root, Inc., G. H. Anthony, J. H. Chaplin, B. Gilbert, Attys. for Gasoline Pump Manufacturers Association and G. Denny Moore.
- May 29—Filed Stipulation.
- May 29—Order extending defendants' time for filing reply briefs to and including June 14, 1941 as per stipulation. Sullivan, J.
- May 29—Filed Notice of Filing of Memorandum in Opposition to Demurrers and Their Supporting Briefs, Daniel D. Britt, Spl. Asst. to Atty. General.
- June 14—Filed Notice of Filing and Proof Of Service of Reply Brief—Attys. for defts.
- June 14—Filed Reply Brief in Support of Demurrers to Both Indictments on behalf of The Wayne Pump Company, B. F. Geyer, Tokheim Oil Tank and Pump Co., Veeder-Root Incorporated, G. H. Anthony, J. H. Chaplin, and Reply Brief of Gasoline Pump Mfgs. Ass'n. and G. Denny Moore in Support of Demurrer to First Indictment—Attys. for defts.
- Dec. 15—Argmts. hrd. in part and contd. for further hrg. to Dec. 16, 1941. Sullivan, J.
- Dec. 16—Argmts. hrd. and contd. and cause taken under advisement. Sullivan, J.
- 1942
- Feb. 24—Defts. demurrer to indictment sustained. Sullivan, J.

- Feb. 24—Filed Opinion of Judge Sullivan.
- Mar. 26—Filed Petition for Appeal—Daniel D. Britt, Special Assistant to the Attorney General.
- Mar. 26—Order allowing appeal to U. S. Supreme Court (draft). Sullivan, J.
- Mar. 26—Filed Statement as to Jurisdiction, Assignments of Error, Proof of Service and Citation and Praecipe—Daniel B. Britt Special Assistant to the Attorney General.
- Mar. 26—Filed Notice to Defendants of Provisions of Rule 12—Daniel D. Britt, Sp'l. Asst. to Atty. General.
- Apr. 2—Issued partial copy of docket entries to Thurman Arnold.
- Apr. 10—Filed Notice—Attys. for Appellees.
- Apr. 10—Filed Statement of Appellees as to the Jurisdiction of the Supreme Court to Review Judgments of District Court entered Feb. 24, 1942—by Harold W. Norman, Louis F. Niezer and Ballard Moore, Attys. for Tokheim Oil Tank and Pump Co., Harold F. McQuire, James M. Carlisle and Arthur A. Lytton, Attys. for Veeder-Root, Incorporated, G. H. Anthony and J. H. Chaplin, and Barney Gilbert, Attorney for Gasoline Pump Manufacturers Association and G. Denny Moore.

6 In the District Court of the United States of America
for the Northern District of Illinois, Eastern Division

DECEMBER 1940 TERM

No. 32597

UNITED STATES OF AMERICA

v.

THE WAYNE PUMP COMPANY, ET. AL.

Indictment

Filed Jan. 31, 1941

UNITED STATES OF AMERICA,

Northern District of Illinois, Eastern Division, ss:

The Grand Jurors of the United States of America, being duly impaneled, sworn, and charged in the District Court of the United States of America, for the Eastern Division of the Northern District of Illinois, at the December 1940 Term of said Court, and inquiring within and for the said Division and District at the said

Term of said Court, upon their oaths find and present as follows, to wit:

I. PERIOD OF TIME COVERED BY THE INDICTMENT

1. Each of the allegations hereinafter contained in this indictment shall be deemed to refer to a period of time beginning in the year 1932, the exact date being to the grand jurors unknown, and continuing thereafter up to and including the date of the presentation of this indictment unless otherwise expressly stated.

2. Each allegation hereinafter made in this indictment that an act has been done by any of the defendants herein, or any other person, shall be deemed to be an allegation that such act was performed within three years next preceding the date of this indictment unless otherwise expressly stated.

II. DEFINITIONS

3. The term "gasoline pump" as used in this indictment shall be deemed to refer to any pump designed for dispensing gasoline.

4. The term "computing mechanism" as used in this indictment shall be deemed to refer to any mechanical device, which may be used in connection with a gasoline pump, that simultaneously calculates and registers quantities and prices of gasoline dispensed by such pump. The term "computing mechanism" shall also be deemed to include any mechanical device which may be used for varying the operation of a price register in a computing mechanism to enable such register to indicate calculated prices corresponding with selective changes made in the unit price of the gasoline being dispensed.

5. The term "computer pump" as used in this indictment shall be deemed to refer to a gasoline pump embodying a computing mechanism.

6. The term "noncomputer pump" as used in this indictment shall be deemed to refer to any gasoline pump other than a computer pump.

7. The word "patent" as used in this indictment shall be deemed to refer to applications for letters patent, applications for reissues of letters patent, as well as to patents.

III. THE DEFENDANTS

8. The following corporations, unincorporated associations, and persons are hereby indicted and made defendants herein:

a. The Wayne Pump Company, a Maryland corporation, having its principal place of business in Fort Wayne, Indiana. Said defendant is sometimes hereinafter referred to as "Wayne."

b. Gilbert and Barker Manufacturing Company, a Massachusetts corporation, having its principal place of business in West Springfield, Massachusetts. Said defendant is sometimes hereinafter referred to as "G & B."

c. Tokheim Oil Tank and Pump Company, an Indian corporation, having its principal place of business in Fort Wayne, Indiana. Said defendant is sometimes hereinafter referred to as "Tokheim."

d. Veeder-Root, Incorporated, a Connecticut corporation, having its principal place of business in Hartford, Connecticut. Said defendant is sometimes hereinafter referred to as "Veeder."

e. Gasoline Pump Manufacturers Association, sometimes hereinafter referred to as "Association," an unincorporated association having its principal office in New York, New York. Its membership consists for the most part of gasoline pump manufacturers including the defendants Wayne, G & B, and Tokheim.

f. B. F. Geyer, a resident of Fort Wayne, Indiana, who was Vice President of defendant Wayne from 1932 to 1937 and has been President of defendant Wayne since 1937. The defendant Geyer was also, from 1932 to 1937, President of Wayne Company, whose relationship with defendant Wayne is set forth hereinafter.

g. S. C. Hope, a resident of Springfield, Massachusetts. Said defendant has been President of defendant G & B during the period of time covered by this indictment.

h. G. H. Anthony, a resident of Hartford, Connecticut. Said defendant has been President of the defendant Veeder during the period of time covered by this indictment.

i. J. H. Chaplin, a resident of Hartford, Connecticut. Said defendant has been Vice President of the defendant Veeder during the period of time covered by this indictment.

j. G. Denny Moore, a resident of White Plains, New York. Said defendant has been Secretary of the defendant Association since 1933.

9. Wherever, in this indictment, it is alleged that a corporate defendant or that the defendant Association did any act or thing, such allegation shall be deemed to mean that the individuals named herein as defendants and described as officers, agents, or employees of said corporate defendant or of the defendant Association, did authorize, order, perform, or ratify such act or thing.

IV. COCONSPIRATORS

10. The following individual is not indicted but is named as a coconspirator herein: C. M. Niezer, a resident of Fort Wayne, Indiana, who has been President of Tokheim during the period of time covered by this indictment. During the period of time

covered by this indictment the above named coconspirator has actively engaged in the management of the business of Tokheim and, on his own behalf and on behalf of Tokheim, has conferred with the defendants named herein and with other persons to the Grand Jurors unknown and has participated in, done, or ordered to be done, in whole or in part, the activities constituting the offense hereinafter charged in this indictment.

V. RELATIONSHIPS OF DEFENDANT WAYNE WITH WAYNE COMPANY

11. From 1932 until 1937, the defendant Wayne owned the stock of Wayne Company, an Indiana corporation having its principal office in Fort Wayne, Indiana. During such period of time Wayne Company was engaged in manufacturing and selling gasoline pumps and acquired ownership or secured control of certain patents pertaining to computing mechanisms and computer pumps and entered into certain license agreements with reference to such patents. The President of defendant Wayne, during said period, was Vice President of Wayne Company, and the Vice President of defendant Wayne was President of Wayne Company. The defendant Wayne controlled the policies of Wayne Company during the aforesaid period of time and authorized, directed, and ratified the acts and things done by Wayne Company and its officers, agents, and employees during said period.

10 12. In 1937 the defendant Wayne took over the assets, including patents and licenses issued under such patents, of its operating subsidiary, Wayne Company, and since such time has been engaged directly in manufacturing and selling gasoline pumps. Wayne Company has not since 1937 been engaged in the manufacture or sale of gasoline pumps.

VI. THE NATURE OF THE TRADE AND COMMERCE INVOLVED

13. The use of gasoline pumps is essential to the proper supply of gasoline to the millions of passenger cars and trucks operating on the highways of the United States. Changes in types of gasoline pumps have paralleled the major changes and improvements in the manufacture of automobiles. The earliest type of gasoline pump pumped gasoline out of one container into another container which acted as a measuring device. Later a gasoline pump was developed to measure a designated quantity of gasoline with a single stroke of the pumping handle. During the middle part of the twenties the so-called visible type of pump appeared on the market. On the top of the visible pump rested a large graduated glass bowl. The required amount of gasoline was pumped into this bowl, usually by hand, and was then dispensed to the customer by permitting gravity to carry the gasoline from

the bowl to the gasoline tank in the motor vehicle. During the latter part of the twenties a great advance in gasoline pump construction was made in the development of the so-called meter pump. This pump, operated either by hand or by electricity, contained in addition to the pump, a meter for measuring the quantity of gasoline. The quantity was then registered by means of pointers revolving around a clock type dial placed above the meter.

11 14. In 1933 the first computer pump was placed on the market and due to public demand, aided by an energetic marketing program such pumps have since that date largely supplanted the non-computer pump. The computer pump was greatly favored by the public because the customer was able to see at a glance both the price and the quantity of the gasoline he had purchased. The shift in public demand from non-computer pumps to computer pumps has been so marked that for several years it has been all but impossible for any gasoline pump manufacturer to continue to engage in such business unless he manufactured computer pumps.

15. The shift in sales from noncomputer to computer pumps is shown by the following table:

MANUFACTURERS' SALES OF GASOLINE PUMPS

Year	Computer pumps	All gasoline pumps including computer pumps	Proportionate value of computer pumps
			Percent
1931	None	\$14,397,681	0
1933	Small production chiefly experimental	7,420,262	9
1935	\$9,076,219	12,060,219	75
1937	\$25,283,753	28,518,799	88
1939	\$20,630,976	22,003,646	91

16. The magnitude of the industry is shown by the fact that there are approximately 1,300,000 gasoline pumps in use in the United States and approximately 100,000 gasoline pumps are sold in the United States each year by gasoline pump manufacturers.

17. Prior to 1932 and during the period of time covered by this indictment, numerous applications for letters patent have been filed in the United States Patent Office on computer pumps, computing mechanisms, and improvements on computer pumps and computing mechanisms, and the United States Patent Office has issued numerous patents on such subjects. On or
12 about November 22, 1932, the United States Patent Office issued a patent, known as the "Jauch Patent," on a computer pump. The Jauch Patent was issued by the Patent Office

to certain employees of the Wayne Company who immediately assigned the said Jauch Patent to the Wayne Company. Under said Jauch Patent and other patents issued as hereinafter described the defendant Wayne has licensed certain other gasoline pump manufacturers to make, use, and sell computer pumps, as hereinafter alleged.

18. An indispensable element of every computer pump is the computing mechanism. Without a source of supply of such mechanisms a manufacturer cannot make computer pumps.

19. The defendant Wayne, both before and after the issuance of the Jauch Patent, entered into certain arrangements and understandings with defendant Veeder, as hereinafter alleged, whereby the manufacturing and other facilities and patents of the defendant Veeder were to be utilized in the development of a commercially feasible computing mechanism. The defendant Veeder developed such a mechanism and during the period of time covered by this indictment, has manufactured such mechanisms and has sold such mechanisms in interstate trade and commerce, for use in computer pumps, only to defendants Wayne, G & B, and Tokheim, and such other manufacturers of gasoline pumps as are permitted by Wayne, G & B, and Tokheim to purchase computing mechanisms from Veeder.

20. The defendant Veeder manufactures computing mechanisms in the State of Connecticut and sells and ships such mechanisms to gasoline pump manufacturers in the States of Indiana, Massachusetts, Pennsylvania, Texas, and other states of the United States where computer pumps are manufactured. Such gasoline pump manufacturers, including defendants Wayne, G & B, and Tokheim, sell and ship computer pumps from their plants to customers located in other States of the United States including customers in the Eastern Division of the Northern District of the State of Illinois.

13 21. During the period of time covered by this indictment the Neptune Meter Company (sometimes hereinafter referred to as "Neptune") manufactured computing mechanisms in the State of New York and sold and shipped such mechanisms to numerous manufacturers of gasoline pumps, other than defendants Wayne, G & B, and Tokheim, located in States other than New York, who used such computing mechanisms in the manufacture of computer pumps which were sold and shipped by such manufacturers to customers located in States other than where the computer pumps were manufactured. Such pumps were sold in competition with those manufactured by the defendant Wayne and its licensees including G & B and Tokheim.

22. During the same period of time other gasoline pump manufacturers produced computing mechanisms which were used in

computer pumps of their own make which were sold and shipped to customers located in States other than where the pumps were manufactured, in competition with the computer pumps manufactured by the defendant Wayne and its licensees, including G & B and Tokheim, and in competition with the computer pumps manufactured by companies purchasing computing mechanisms from Neptune.

23. Since the year 1938, however, the defendant Veeder has been the sole manufacturer in the United States of computing mechanisms used in computer pumps and the only available source of computing mechanisms used by manufacturers in the making of computer pumps.

24. The defendants Wayne, G & B, and Tokheim during the period of time covered by this indictment have been the three leading manufacturers of gasoline pumps in the United States. In 1939 such defendants manufactured and sold computer pumps constituting 56% of the value of all computer pumps sold in the United States, while Wayne, G & B, and Tokheim, with the eight other manufacturers licensed by Wayne, with the consent of G & B and Tokheim, to buy computing mechanisms from defendant Veeder and make computer pumps, manufac-

14. tured and sold 100 per cent of the computer pumps made and sold in the United States. In the same year gasoline pumps of all types manufactured by Wayne and its licensees constituted approximately 99 per cent of the value of all gasoline pumps manufactured and sold in the United States. In 1931, prior to the introduction of computer pumps, there were approximately thirty manufacturers of gasoline pumps in the United States.

25. Most of the computer pumps manufactured by defendants Wayne, G & B, and Tokheim and other manufacturers are sold in interstate trade and commerce to major oil companies and to independent gasoline station operators for installation in gasoline filling stations throughout the United States.

VII. THE COMBINATION AND CONSPIRACY

26. The Grand Jurors aforesaid, upon their oaths aforesaid, do further present that all the defendants herein and other persons to the Grand Jurors unknown, well knowing all the facts alleged in this indictment, beginning in or about the year 1932, the exact date being to the Grand Jurors unknown, and continuously thereafter up to and including the date of the presentation of this indictment, knowingly have entered into and engaged in a combination and conspiracy to fix, maintain, and control arbitrary, artificial, and noncompetitive prices for the sale of computer

pumps in the aforesaid interstate trade and commerce, which combination and conspiracy, in fact, has been and is now in restraint of trade and commerce in computer pumps among the several states and in violation of Section 1 of the Act of Congress of July 2, 1890 entitled "An Act To protect trade and commerce against unlawful restraints and monopolies" (U. S. C. A., Title 15, Section 1), commonly known as the Sherman Act; which combination and conspiracy is now described in further detail, that is to say:

27. It is and has been a part of said combination and conspiracy that the defendants Wayne, G & B, and Tokheim
 15 use the Jauch patent owned by Wayne for the purpose of fixing prices among themselves on their sales of computer pumps; that the defendant Wayne license the defendants G & B and Tokheim under the Jauch patent to make, use, and sell computer pumps; that the defendants Veeder, G & B, and Tokheim acknowledge the validity of the Jauch patent; that the defendant Wayne acquire, by purchase or otherwise, ownership or control of all patents on computing mechanisms and computer pumps capable of competing with computing mechanisms manufactured by Veeder or with computer pumps manufactured by Wayne, G & B, and Tokheim; that the defendant Veeder convey to Wayne ownership or control of all patents covering computing mechanisms and vital parts thereof developed by Veeder or its employees; that the defendant Veeder acquire, by purchase or otherwise, ownership or control of patents on computing mechanisms capable of competing with computing mechanisms manufactured by Veeder or with computer pumps manufactured by Wayne, G & B, and Tokheim and convey ownership or control of such patents to Wayne; that the defendant Wayne determine the use of all patents on computing mechanisms and computer pumps and improvements thereon owned or controlled by either of the defendants G & B and Tokheim; that the defendant Wayne secure for itself and its gasoline pump manufacturer licensees special rights under patents on devices pertaining to the operation of computer pumps which are required by State Sealers or Fire Underwriters; that the defendant Wayne cause owners of all patents which the United States Patent Office declares to be in interference with the Jauch patent, to file in said Patent Office concessions of priority to the Jauch patent; that the defendants Wayne, G & B, and Tokheim purchase computing mechanisms only from the defendant Veeder; that Veeder sell computing mechanisms for use in the manufacture of computer pumps only to Wayne, G & B, and Tokheim and other purchasers approved by Wayne, G & B, and Tokheim; that the defendants Wayne,

G & B, and Tokheim devise a formula for determining minimum prices for the sale of computer pumps; that the defendant

16 Wayne, on the basis of aforesaid formula, determine prices for the sale of computer pumps; that the defendants

Wayne, G & B, and Tokheim also determine other terms and conditions for the sale of computer pumps, including discounts

and salesmen's commissions; that the defendant Wayne from time to time issue announcements and regulations stating and

interpreting the aforesaid prices, discounts, commissions, terms and conditions; that the defendants Wayne, G & B, and Tokheim,

in selling computer pumps, adhere to the prices, discounts, commissions, terms, and conditions contained in the aforesaid announcements and regulations; that the said defendants determine

jobbers' resale prices for computer pumps, refuse to sell computer pumps to any jobber failing or refusing to adhere to such resale

prices, and eliminate discounts to all jobbers in the event of a general failure by jobbers to adhere to the said resale prices;

that the said defendants, in determining salesmen's commissions as aforesaid, lower them from time to time and require discounts

to be deducted from said salesmen's commissions; that the said defendants refrain from using computing mechanisms to convert

noncomputer pumps into computer pumps; that the said defendants refuse to sell computing mechanisms for use in converting

noncomputer pumps into computer pumps; that the said defendants restrict and discourage the sale of noncomputer pumps and

vigorously promote the sale of computer pumps; that the defendant Wayne license no others than G & B and Tokheim under

the Jauch patent except with the consent of G & B and Tokheim and upon terms authorized by G & B and Tokheim; that the

defendant Wayne with the consent of the defendants G & B and Tokheim approach gasoline pump manufacturers purchasing computing

mechanisms from Neptune and all gasoline pump manufacturers using computing mechanisms of their own make in the

manufacture of computer pumps, induce each of such manufacturers to accept a license under the Jauch patent, and, with

the authorization of G & B and Tokheim, issue such license to each of such manufacturers on terms securing to the

17 defendants Wayne, G & B, and Tokheim control of all of the new licensee's patents on computing mechanisms and

computer pumps and of the licensee's prices for the sale of computer pumps; that the defendant Wayne with the consent of

G & B and Tokheim compel Neptune, the sole manufacturer and seller of computing mechanisms other than Veeder, to forever

acknowledge the validity of the Jauch patent, to submit all patents on computer pumps and computing mechanisms owned

or controlled by Neptune to uses determined by Wayne, to refrain from manufacturing computing mechanisms except with the approval of Wayne, and to refrain from selling computing mechanisms except to customers approved by Wayne, G & B, and Tokheim; that the defendants Wayne, G & B, and Tokheim share royalty payments secured from the aforesaid new licensees; that the defendants Wayne, G & B, and Tokheim share litigation expenses incurred in enforcing the terms of the aforesaid new licenses; that the defendant Wayne charge each of such new licensees with violations of its license, and under threat of cancellation of the license and imposition of liquidated damages, demand that each of such licensees accept a substitute license, and issue such license to each of said licensees on terms securing to Wayne, G & B, and Tokheim control of the ownership and official personnel of the licensee and protecting the Jauch patent in perpetuity; that the defendant Association, at meetings of its gasoline pump manufacturer members, consider ways and means of enforcing the provisions of the aforesaid licenses and the price and other regulations issued by Wayne as aforesaid; that the defendant Association at meetings of sales managers and salesmen employed by the defendant Wayne and its gasoline pump manufacturer licensees instruct, persuade, and compel such persons to adhere to the prices, discounts, commissions, terms, and conditions for the sale of computer pumps agreed upon by the defendants Wayne, G & B, and Tokheim; that the defendant Association urge and compel jobbers to adhere to the resale prices on computer pumps agreed upon by defendants Wayne, G & B, and Tokheim; and that the defendant Association collect and transmit to the other defendants information relating to the sales and prices of computer pumps.

28. For the purpose of effectuating the aforesaid combination and conspiracy the defendants have regularly and continuously entered into those agreements and done those things which, as hereinbefore alleged, they have combined and conspired to do and more particularly have done, among other, the following acts and things:

The defendant Tokheim during 1934 gave its consent to the licensing by Wayne under the Jauch patent of gasoline pump manufacturers purchasing Neptune's computing mechanism and gasoline pump manufacturers using computing mechanisms of their own make in the manufacture of computer pumps. In giving such consent the Board of Directors of defendant Tokheim passed a resolution on or about November 10, 1934, stating "That we consent to a licensing arrangement to other companies only under terms that will admit of price control * * *." This

resolution was passed after C. M. Niezer, Chairman of the Board of Directors, had "brought to the attention of the Board the rather delicate status of the Computer situation, with reference, particularly, to doubtful claims in the Wayne Company patent," under which Tokheim was licensed.

The defendant Wayne, with the consent of G & B and Tokheim, on or about January 2, 1935 issued a license under the Jauch patent to John Wood Manufacturing Company, Inc., a gasoline pump manufacturer using computing mechanisms of its own make in the manufacture of computer pumps, which was substantially similar to other licenses issued at approximately the same time to gasoline pump manufacturers purchasing Neptune computing mechanisms, and contained the following terms and conditions, among others: that the licensee acknowledge the validity of the Jauch patent; that all patents on computing

mechanisms and computer pumps and improvements thereon owned or controlled by the licensee be subject to uses determined by the defendant Wayne; that the licensee refrain from using computing mechanisms to convert noncomputer pumps into computer pumps and from selling computing mechanisms for such purpose; that the licensee purchase computing mechanisms only from Veeder unless an exception was allowed by Wayne; that the licensee adhere to the prices, discounts, commissions, terms, and conditions for the sale of computer pumps determined by Wayne; that Wayne have the right to enforce adherence to the aforesaid terms and conditions by imposing liquidated damages or by cancellation of the license or both and by withdrawing from the licensee permission to purchase computing mechanisms from Veeder; that the licensee make certain royalty payments to Wayne.

Prior to the grant of such license the United States Patent Office had declared a patent on computing mechanisms controlled by John Wood Manufacturing Company, Inc. to be in interference with the Jauch patent. Wayne, as a condition to the grant of a license to the John Wood company, required such licensee to cause to be filed in the United States Patent Office a concession of priority to the Jauch patent, which concession was filed in said Office in January 1935.

In or about June 1935 the defendant Wayne, with the consent of G & B and Tokheim, offered Neptune a license under the terms of which Neptune would acknowledge the validity of the Jauch patent, refrain from selling computing mechanisms to other companies except with the permission of Wayne, G & B, and Tokheim, and would permit all patents on computing mechanisms and computer pumps and improvements thereon, then owned or controlled or thereafter owned or controlled by Neptune, to be

subject to uses determined by the defendant Wayne. Neptune refused such license. Wayne in or about June 1935 offered to sell the Jauch and other patents on computing mechanisms and computer pumps owned or controlled by Wayne to Neptune

20 on condition that Neptune would thereafter administer the licenses already issued under the Jauch patent on terms and conditions, including price control, established by the defendant Wayne. Such offer was refused by Neptune. During 1935 the defendant Wayne, with the approval of G & B and Tokheim, instituted infringement proceedings against a user of a computer pump embodying a Neptune computing mechanism. Such suit was defended by Neptune. Wayne and Neptune during 1937 entered into a settlement of such suit, which settlement contained the following terms and conditions, among others: that Neptune acknowledge the validity of the Jauch patent in perpetuity; that all patents on computing mechanisms and computer pumps owned or controlled and thereafter acquired by Neptune be subject to uses determined by Wayne; that Neptune refrain from manufacturing computing mechanisms except with the approval of Wayne; that Neptune sell no computing mechanisms except to customers approved by Wayne, G & B, and Tokheim; that Neptune require a licensee of Wayne whose stock was controlled by Neptune to accept a substitute license under the terms of which said licensee would acknowledge the validity of the Jauch patent in perpetuity, would permit Wayne to fix or eliminate discounts to jobbers and would permit Wayne to cancel said license in the event of specified changes in the ownership of said licensee. The substitute license agreement required of such licensee was executed during 1937. Since the execution of the aforesaid agreement between Wayne and Neptune the defendant Wayne has refused to license other gasoline pump manufacturers under the Jauch patent and the defendant Veeder has refused to supply computing mechanisms to any gasoline pump manufacturer except Wayne, G & B, Tokheim, and Wayne's other licensees.

During 1938 Wayne conducted an audit of the books of its licensees, threatened licensees other than G & B and Tokheim with the imposition of liquidated damages and with cancellation of their licenses for alleged violations thereof, 21 and demanded that the licensees other than G & B and Tokheim enter into new license agreements. With the exception of Martin & Schwartz, Inc., such licensees other than G & B and Tokheim during 1938 entered into substantially similar substitute license agreements with defendant Wayne under the Jauch patent. These substituted licenses in addition to many of the clauses contained in the previous agreements contained clauses

providing that the licensee acknowledge the validity of the Jauch patent in perpetuity, that the licensee grant to Wayne the right to fix or eliminate discounts to jobbers, that the licensee grant to Wayne the right to cancel the license in the event of specified changes in the ownership or management of the licensee, and that improvements on computer pumps developed by the licensee which might be required by State Sealers or Fire Underwriters, not be submitted to such State Sealers or Fire Underwriters except by Wayne or with Wayne's express approval.

In or about June 1938 Wayne issued regulations to its licensees eliminating discounts to jobbers.

The defendant Wayne through regulations issued to its licensees, has established from time to time the following maximum commissions payable to salesmen of computer pumps:

January 3, 1935, 25 per cent.

August 1, 1935, 22½ per cent.

January 1, 1937, 17½ per cent.

January 1, 1939, 15 per cent.

January 1, 1941, 10 per cent.

During 1939 the defendant Wayne cancelled the license agreement of the smallest of its licensees and Veeder thereafter refused to sell computing mechanisms to such licensee without specific authorization from Wayne.

29. The combination and conspiracy hereinbefore described was intended to have and did have the following effects,
22 among others: the defendants have from time to time reduced the commissions paid to salesmen of computer pumps, thereby reducing the income of such salesmen; have eliminated discounts to jobbers, thereby eliminating such jobbers from the business of buying and selling computer pumps; have prevented and controlled changes in the management and ownership of Wayne's gasoline pump manufacturer licensees other than defendants G & B and Tokheim; have eliminated from the gasoline pump manufacturing field many manufacturers of gasoline pumps; have prevented the use of computing mechanisms to modernize noncomputer pumps; have secured control of all manufacturing sources of computing mechanisms in the United States; have secured ownership or control of all patents pertaining to computing mechanisms and computer pumps; have restricted the manufacture of computing mechanisms to the defendant Veeder; have restricted the manufacture of computer pumps to the defendant Wayne and its gasoline pump manufacturer licensees; have restricted the purchase of computing mechanisms for use in manufacturing computer pumps to Wayne and its licensees; have prevented the institution and continuation of litigation

threatening the validity of the Jauch patent; have suppressed competition in the development, acquisition, and use of inventions and patents relating to computing mechanisms and computer pumps; have fixed arbitrary, artificial, and noncompetitive prices for the sale of computer pumps; and have in these and other ways restrained interstate trade and commerce in computer pumps.

VIII. JURISDICTION AND VENUE

30. The combination and conspiracy hereinbefore alleged has operated and has been carried out within the Eastern Division of the Northern District of Illinois. Among other acts committed in the Eastern Division of the Northern District of Illinois by the defendants herein pursuant to the combination and conspiracy herein alleged and in furtherance thereof, during the period of time covered by this indictment and within three years preceding the date of the return of this indictment, were the following:

The defendants Wayne, G & B, and Tokheim have continuously solicited orders in the City of Chicago for computer pumps at the prices and upon the terms and conditions established by the said combination and conspiracy and have sold and shipped such computer pumps at such prices, terms, and conditions from the States of Indiana and Massachusetts to customers in the City of Chicago.

The defendants Wayne, G & B, and Tokheim have since in or about June 1938 prevented jobbers in the City of Chicago from buying computer pumps manufactured without the State of Illinois and from selling such computer pumps within the City of Chicago.

The defendants Wayne, G & B, and Tokheim have continuously restricted the commissions payable to Chicago salesmen of computer pumps manufactured without the State of Illinois and shipped into and sold by such salesmen within the City of Chicago.

The defendant Geyer on behalf of defendant Wayne in or about December 1938 participated in meetings and conferences held within the City of Chicago relative to the execution of new license agreements between Wayne and its licensee John Wood Manufacturing Company, Inc. and in furtherance of the hereinbefore alleged combination and conspiracy.

The defendant Geyer on behalf of defendant Wayne in or about July 1938 participated in meetings and conferences held within the City of Chicago relative to the execution of new

license agreements between defendant Wayne and its licensee the Southwest Pump Company and in furtherance of the hereinbefore alleged combination and conspiracy.

Representatives of the defendant Wayne in or about November 1939 participated in meetings and conferences with the Neptune Meter Company relative to the imposition of liquidated damages upon said Company and attempted at said meetings and conferences to induce the Neptune Meter Company to enter into further license agreements in furtherance of the aforesaid combination and conspiracy.

The defendant Geyer on behalf of defendant Wayne in or about June 1938 participated in meetings and conferences held within the City of Chicago relative to the acquisition of special rights under patents for use in connection with the operation of computer pumps.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do present that the defendants named, at the time and place and in the manner aforesaid, unlawfully have engaged in a continuing combination and conspiracy in restraint of trade and commerce in computer pumps among the several States of the United States contrary to the form of the statute of the United States in such case provided and against the peace and dignity of the United States of America.

(s) LEO F. TIERNEY,
Leo F. Tierney,

(s) DANIEL B. BRITT,
Daniel B. Britt,

Special Assistants to the Attorney General.

(s) WILLIS L. HOTCHKISS,
Willis L. Hotchkiss,

(s) JAMES C. CRAMOND,
James C. Cramond,

Special Attorneys.

(s) THURMAN ARNOLD,
Thurman Arnold,

Assistant Attorney General.

(s) PAUL D. PAGE, JR.,
Paul D. Page, Jr.,

Special Assistant to the Attorney General.

(s) J. ALBERT WOLL,
J. Albert Woll,

United States Attorney.

25 Indictment. Violation of Section One of the Act of July 2, 1890 (U. S. C. A., Title 15, Sec. 1). A true bill, R. W. Barron, Foreman. Filed in open court this 31st day of January A. D. 1941. Hoyt King, Clerk.

26 In District Court of the United States

[Title omitted.]

Demurrer of Defendant Tokheim Oil Tank and Pump Company, a corporation, to the said indictment

(Filed March 29, 1941)

Now comes Tokheim Oil Tank and Pump Company, a corporation, defendant in the above-entitled cause, by Ballard Moore, Louis F. Niezer, and Harold W. Norman, its attorneys, and demurs to the indictment and says that the said indictment and the matters therein contained in substance and in form as the same are therein alleged and set forth, are not sufficient in law to require this defendant to plead to said indictment or to answer the same, and that said indictment is insufficient in law to sustain a judgment against this defendant, and for grounds of said demurrer shows:

1. Said indictment, in violation of the rights guaranteed to said defendant by the Fifth and Sixth Amendments to the Constitution of the United States, fails to describe and particularize the offense attempted to be charged therein with sufficient definiteness, certainty and specificity to inform it of the nature and cause of the accusation, to enable it to prepare and make its defense thereto, and to enable it to plead an acquittal or a conviction thereunder in bar of any other proceedings against it based on the matters or things, or any of them, on which said indictment is based.

2. The averments of said indictment purporting to charge a combination and conspiracy in restraint of trade are mere conclusions.

3. Said indictment fails to make averments sufficient to identify and describe the supposed combination and conspiracy, in that it does not allege with particularity any of the following:

(a) The factual basis upon which the United States relies for its charge that a combination and conspiracy exists or has existed;

(b) The manner of formation of the supposed combination and conspiracy;

(c) The terms of the supposed combination and conspiracy; or

(d). The manner in and by which it is claimed that said defendants became parties to the supposed combination or conspiracy.

4. The allegations in said indictment with respect to the supposed combination and conspiracy in restraint of trade, and to the intended means for the accomplishment thereof, are so vague, indefinite, uncertain, and conclusory in character as to fail to apprise this defendant of the manner in which the prosecution claims that it has violated the law pertaining to combination or conspiracy in restraint of trade among the several states.

28 Because certain defects are specified herein, it is not intended that any other defects, omissions, or imperfections are waived, and the same are hereby insisted upon with like effect as if the same were herein set forth and enumerated.

For all of which causes of demurrer existing, this defendant says that said alleged indictment is demurrable and is not sufficient in substance or in form for it to make plea unto.

Wherefore this defendant prays that this demurrer be sustained and that said indictment be dismissed as to this defendant and that it go hence without day.

(Sgd.) BALLARD MOORE,

Ballard Moore,

(Sgd.) LOUIS F. NIEZER,

Louis F. Niezer,

(Sgd.) HAROLD W. NORMAN,

Harold W. Norman,

*Attorneys for Tokheim Oil Tank & Pump Company,
a corporation, defendant.*

20 In the District Court of the United States

[Title omitted.]

Joint and several demurrer of defendants The Wayne Pump Company, a corporation, and B. F. Geyer to the said indictment

Filed March 31, 1941

Now come The Wayne Pump Company, a corporation, and B. F. Geyer, defendants in the above entitled cause, by Edward R. Johnston, Charles L. Byron, and Howard Somervell, their attorneys, and jointly and severally demur to the indictment and say that the said indictment and the matters therein contained in substance and in form as the same are therein alleged and set forth are not sufficient in law to require these defendants, or

either of them, to plead to said indictment, or to answer the same, and that said indictment is insufficient in law to sustain a judgment against said defendants, or either of them; and for grounds of said demurrer show:

1. Said indictment, in violation of the rights guaranteed to said defendants by the Fifth and Sixth Amendments to the Constitution of the United States, fails to describe and particularize the offense attempted to be charged therein with sufficient definiteness, certainty and specificity to inform them of the nature and cause of the accusation, to enable them to prepare and make their defense thereto, and to enable them to plead an acquittal or a conviction thereunder in bar of any other proceedings against them based on the matters or things, or any of them, on which said indictment is based.

2. The averments of said indictment purporting to charge a combination and conspiracy in restraint of trade are mere conclusions.

3. Said indictment fails to make averments sufficient to identify and describe the supposed combination and conspiracy, in that it does not allege with particularity any of the following:

(a) The factual basis upon which the United States relies for its charge that a combination and conspiracy exists or has existed;

(b) The manner of formation of the supposed combination and conspiracy;

(c) The terms of the supposed combination and conspiracy; or

(d) The manner in and by which it is claimed that said defendants became parties to the supposed combination or conspiracy;

4. The allegations in said indictment with respect to the supposed combination and conspiracy in restraint of trade, and to the intended means for the accomplishment thereof, are so vague, indefinite, uncertain, and conclusory in character as to fail to apprise said defendants of the manner in which the prosecution claims that they have violated the law pertaining to combination or conspiracy in restraint of trade among the several states.

31 Because certain defects are specified herein, it is not intended that any other defects, omissions, or imperfections are waived, and the same are hereby insisted upon with like effect as if the same were herein set forth and enumerated.

For all of which causes of demurrer existing, these defendants jointly and severally say that said alleged indictment is demurrable and is not sufficient in substance or in form for them or either of them to make plea unto.

Wherefore these defendants jointly and severally pray that this demurrer be sustained and that said indictment be dismissed

as to these defendants and that they and each of them go hence without day.

(Sgd.) EDWARD R. JOHNSTON,

(Sgd.) CHARLES L. BYRON,

(Sgd.) HOWARD SOMERVELL,

Attorneys for said Defendants.

32 In District Court of the United States

Joint and several demurrer of the Defendants Gilbert & Barker Manufacturing Company, a Corporation, and S. C. Hope

Filed March 31, 1941

Now come the defendants Gilbert & Barker Manufacturing Company, a corporation, and S. C. Hope, by James H. Winston, John C. Slade, and George W. Ott, their attorneys, and say that said indictment and the matters therein contained, in substance and in form as the same are therein alleged and set forth, are insufficient in law to require these defendants, or either of them, to plead to said indictment or to answer the same, and say that said indictment is insufficient in law to sustain a judgment against said defendants or either of them; and, without intending to waive any other substantial causes of demurrer by the enumeration of the following specific causes, further demur to said indictment upon the following grounds:

(1) The allegations in said indictment are so vague, indefinite, and uncertain as to fail to apprise these defendants, or
33 either of them, of the nature of the charges against them or in what manner they, or either of them, have violated the law pertaining to combination or conspiracy in restraint of trade between the several States, or to exhibit to them facts so that they, or either of them, may know the nature of the charges against them sufficiently to prepare their defense.

(2) The averments of said indictment purporting to charge a combination and conspiracy in restraint of trade are mere conclusions, and said indictment fails to state acts and things essential to inform these defendants as to the supposed combination and conspiracy under said Section 1 of the Sherman Act.

(3) The said indictment fails to make averments sufficient to identify the supposed combination and conspiracy in that it does not allege with particularity any of the following:

(a) The manner of formation of the supposed combination and conspiracy, or any factual basis for the Government's theory that a combination and conspiracy exists or has existed;

(b) The terms of the supposed combination and conspiracy; or

(c) The occurrence, transaction, or other test whereby the defendants may determine the Government's theory as to the

existence of any combination or conspiracy, or whereby to determine the Government's theory as to what were the
 34 acts or events that put these defendants into the supposed combination or conspiracy.

(4) The said indictment fails to aver ultimate facts as distinguished from mere conclusions of the pleader, sufficient to inform the Court as to the supposed conspiracy under Section 1 of the Sherman Act.

(5) Although said indictment charges as a mere conclusion that there was and is a combination and conspiracy, said indictment significantly fails to allege that the defendant Gilbert & Barker Manufacturing Company or the defendant S. C. Hope, as its officer, agreed with, or acted in concert with, any corporation or persons whatsoever to do any of the things mentioned in said indictment other than to the extent involved in the taking by Gilbert & Barker Manufacturing Company of a license under the Jauch Patent from said Wayne Pump Company.

(6) The said indictment denies to these defendants the right guaranteed to them under the Fifth and Sixth Amendments to the Constitution of the United States, in that it fails to be an indictment returned by a Grand Jury which informs them of the nature and cause of the accusation.

For all of which causes of demurrer existing, these defendants jointly and severally say that said alleged indictment is demurrable and is not sufficient in law for them, or either of them, to make plea unto.

35 Wherefore, these defendants jointly and severally pray that this demurrer be sustained and that said indictment be dismissed as to these defendants, and that they, and each of them, go hence without day.

JAMES H. WINSTON,
 JOHN C. SLADE,
 GEORGE W. OTT.

*Attorneys for Gilbert & Barker Manufacturing Company,
 a corporation, and S. C. Hope, Defendants.*

36

In District Court of the United States

[Title omitted.]

Joint and several demurrer of Defendants Veeder-Root, Incorporated, a Corporation, G. H. Anthony and J. H. Chaplin to the said indictment

Filed March 31, 1941

Now come Veeder-Root, Incorporated, a corporation, G. H. Anthony and J. H. Chaplin, defendants in the above-entitled

cause, by Harold F. McGuire, James M. Carlisle, and Arthur S. Lytton, their attorneys, and jointly and severally demur to the indictment and say that the said indictment and the matters therein contained in substance, and in form as the same are therein alleged and set forth are not sufficient in law to require these defendants, or any of them, to plead to said indictment, or to answer the same, and that said indictment is insufficient in law to sustain a judgment against said defendants, or any of them, and for grounds of said demurrer show:

1. Said indictment, in violation of the rights guaranteed to said defendants by the Fifth and Sixth Amendments to the Constitution of the United States, fails to describe and
 37 particularize the offense attempted to be charged therein with sufficient definiteness, certainty and specificity to inform them of the nature and cause of the accusation to enable them to prepare and make their defense thereto and to enable them to plead an acquittal or a conviction thereunder in bar of any other proceedings against them based on the matters or things, or any of them, on which said indictment is based.

2. The averments of said indictment purporting to charge a combination and conspiracy in restraint of trade are mere conclusions.

3. Said indictment fails to make averments sufficient to identify and describe the supposed combination and conspiracy, in that it does not allege with particularity any of the following:

(a) The factual basis upon which the United States relies for its charge that a combination and conspiracy exists or has existed;

(b) The manner of formation of the supposed combination and conspiracy;

(c) The terms of the supposed combination and conspiracy; or

(d) The manner in and by which it is claimed that said defendants became parties to the supposed combination or conspiracy.

4. The allegations in said indictment with respect to the supposed combination and conspiracy in restraint of trade, and to the intended means and for the accomplishment thereof, are so vague, indefinite, uncertain, and conclusory in character as to fail to apprise said defendants of the manner in which the prosecution claims that they have violated the law pertaining to combination or conspiracy in restraint of trade among the several states.

38 Because certain defects are specified herein, it is not intended that any other defects, omissions, or imperfec-

tions are waived, and the same are hereby insisted upon with like effect as if the same were herein set forth and enumerated.

For all of which causes of demurrer existing, these defendants jointly and severally say that said alleged indictment is demurrable and is not sufficient in substance or in form for them or either of them to make plea unto.

Wherefore these defendants jointly and severally pray that this demurrer be sustained and that said indictment be dismissed as to these defendants and that they and each of them go hence without day.

JAMES M. CARLISLE.
HAROLD F. MCGUIRE.
- ARTHUR S. LYTTON.

39 In District Court of the United States.

[Title omitted.]

Joint and several demurrer of the defendants, Gasoline Pump Manufacturers Association (an Unincorporated Association) and G. Denny Moore

Filed April 4, 1941

Now come Gasoline Pump Manufacturers Association, an unincorporated association, and G. Denny Moore, defendants in the above entitled cause, by Barry Gilbert, their attorney, and jointly and severally demur to the indictment and say that the said indictment and the matters therein contained in substance and in form as the same are therein alleged and set forth are not sufficient in law for them, or either of them, to be required to plead thereto, and for grounds of said demurrer show:

1. Said indictment, in violation of the rights guaranteed to said defendants by the Fifth and Sixth Amendments to the Constitution of the United States, fails to describe and particularize the offense attempted to be charged therein with sufficient definiteness, specifcness, and certainty to inform them of the nature and cause of the accusation, to enable them to prepare and make their defense thereto, and to enable them to plead an acquittal or a conviction thereunder, in bar of any other proceedings against them based on the matters or things, or any of them, on which said indictment is based.

2. The averments of said indictment purporting to charge a combination and conspiracy in restraint of trade are mere con-

clusions, and said indictment fails to state acts and things essential to inform these defendants as to the supposed combination and conspiracy under said Section 1 of the Sherman Act.

3. Said indictment fails to make averments sufficient to identify and describe the supposed combination and conspiracy, in that it does not allege with particularity any of the following:

(a) The factual basis upon which the United States relies for its charge that a combination and conspiracy exists or has existed;

(b) The manner of formation of the supposed combination and conspiracy;

(c) The terms of the supposed combination and conspiracy; or

(d) The manner in and by which it is claimed that said defendants became parties to the supposed combination or conspiracy.

4. The allegations in said indictment with respect to the supposed combination and conspiracy in restraint of trade, and to the intended means for the accomplishment thereof, are

41 so vague, indefinite, and uncertain in character as to fail to apprise said defendants of the manner in which the prosecution claims that they have violated the law pertaining to combination or conspiracy in restraint of trade among the several states.

5. The said indictment fails to aver ultimate facts as distinguished from mere conclusions of the pleader, sufficient to apprise said defendants of the manner in which the prosecution claims that they have violated the law pertaining to combination or conspiracy in restraint of trade among the several states.

Because certain defects are specified herein, it is not intended that any defects, omissions, or imperfections are waived, and the same are hereby insisted upon with like effect as if the same were herein set forth and enumerated.

For all of which causes of demurrer existing, these defendants jointly and severally say that said alleged indictment is demurrable and is not sufficient in substance or in form for them or either of them to make plea unto.

Wherefore these defendants jointly and severally pray that this demurrer be sustained and that said indictment be dismissed as to these defendants and that they and each of them go hence without day.

(Sgd.) BARRY GILBERT,
Attorney for said Defendants.

42 In the District Court of the United States for the Northern
District of Illinois, Eastern Division

Indictment No. 32597-

UNITED STATES OF AMERICA

v.

THE WAYNE PUMP COMPANY, ET AL.

Indictment No. 32598

UNITED STATES OF AMERICA

v.

THE WAYNE PUMP COMPANY, ET AL.

Opinion

Filed Feb. 24, 1942

The two above indictments were returned on January 31st, 1941. Indictment No. 32597, known as the price fixing indictment, names as defendants four corporations: The Wayne Pump Company, a Maryland corporation; Gilbert & Barker Manufacturing Company, a Massachusetts corporation; Tokheim Oil Tank & Pump Company, an Indiana corporation; and Veeder-Root, Inc., a Connecticut corporation; one unincorporated association, the Gasoline Pump Manufacturers Association, its membership being composed of gasoline pump manufacturers, including Wayne Pump Company, G. & B. and Tokheim; and five individuals, who are officers of the various corporations, and charges them with having entered into and engaged in a combination and conspiracy to fix, maintain and control the prices of gasoline computer pumps in interstate commerce, in violation of Section 1 of the Sherman Act (15 U. S. C. A. 1).

Indictment No. 32597, known as the monopoly indictment in count one charges the four corporations and four of the individuals named in indictment No. 32597 with having entered into and engaged in a combination and conspiracy to monopolize the manufacture and sale of computer pumps; and in count two with having entered into and engaged in a combination and conspiracy to monopolize the manufacture and sale of computer mechanisms in interstate commerce, in violation of Section 2 of the Sherman Act (15 U. S. C. A. 2).

The indictments cover a period of time beginning in 1932 and continuing to the time of the return of the indictments, and set out that the acts alleged in the indictments were performed within three years next preceding the date of the return of the indictments.

The following terms are used and defined in the indictments:

"Gasoline pump" shall be deemed to refer to any pump designed to dispense gasoline.

"Computing mechanism" shall be deemed to refer to any mechanical device which may be used in connection with a gasoline pump, that simultaneously calculates and registers quantities and prices of gasoline dispensed by such pumps. The term "computing mechanism" shall also be deemed to include any mechanical device which may be used for varying the operation

43 of a price register in a computing mechanism to enable such register to indicate calculated prices corresponding with selective changes made in the unit price of the gasoline being dispensed.

"Computer pump" shall be deemed to refer to a gasoline pump embodying a computing mechanism.

"Noncomputer pump" shall be deemed to refer to any gasoline pump other than a computer pump.

"Patent" shall be deemed to refer to applications for letters patent, applications for reissues of letters patent, as well as to patents.

The defendants, The Wayne Pump Company (hereinafter referred to as Wayne Pump Company), Gilbert & Barker Manufacturing Company (hereinafter referred to as G. & B.), and Tokheim Oil Tank & Pump Company (hereinafter referred to as Tokheim), are engaged in the manufacture of computer pumps. Defendant Veeder-Root, Inc. (hereinafter referred to as Veeder) is engaged in the manufacture of computing mechanisms. Defendant Gasoline Pump Manufacturers Association (hereinafter referred to as The Association) is a trade association whose membership consists, according to the indictment, "for the most part of gasoline pump manufacturers." The individual defendants named in the indictments are officers of the four corporations, and one employee of The Association.

C. M. Niezer, a resident of Fort Wayne, Indiana, who has been president of Tokheim during the period of time covered by these indictments, is named as a coconspirator therein, but is not indicted. The indictments charge that during the period of time covered by them this coconspirator has been actively engaged in the management of Tokheim, and has conferred with the various defendants and with others, and has participated in the activities constituting the offenses charged in the indictments.

The indictments also charge that from 1932 to 1937 the Wayne Pump Company owned the stock of Wayne Company, an Indiana corporation, which was engaged in manufacturing and selling gasoline pumps, and acquired ownership and control of certain patents pertaining to computer pumps and computing mechanisms and entered into license agreements with reference to such patents. That the president of Wayne Pump Company during said period was vice president of the Wayne Company, and the Vice President of the Wayne Pump Company was president of the Wayne Company, and that Wayne Pump Company controlled the policies of the Wayne Company during that period. That in 1937 the Wayne Pump Company took over the assets, including the patents and licenses issued under them, and since that time has been directly engaged in manufacturing and selling gasoline pumps, and that the Wayne Company has ceased to manufacture or sell gasoline pumps.

44 Paragraphs 13 to 25, inclusive of the indictments describe the nature of the trade and commerce involved, and set out that:

"13. The use of gasoline pumps is essential to the proper supply of gasoline to the millions of passenger cars and trucks operating on the highways of the United States. Changes in types of gasoline pumps have paralleled the major changes and improvements in the manufacture of automobiles. The earliest type of gasoline pump pumped gasoline out of one container into another container which acted as a measuring device. Later a gasoline pump was developed to measure a designated quantity of gasoline with a single stroke of the pumping handle. During the middle part of the twenties the so-called visible type of pump appeared on the market. On the top of the visible pump rested a large graduated glass bowl. The required amount of gasoline was pumped into this bowl, usually by hand, and was then dispensed to the customer by permitting gravity to carry the gasoline from the bowl to the gasoline tank in the motor vehicle. During the latter part of the twenties a great advance in gasoline pump construction was made in the development of the so-called meter pumps. This pump, operated either by hand or by electricity, contained in addition to the pump, a meter for measuring the quantity of gasoline. The quantity was then registered by means of pointers revolving around a clock type dial placed above the meter.

"14. In 1933 the first computer pump was placed on the market and due to public demand, aided by an energetic marketing program, such pumps have since that date largely supplanted the noncomputer pump. The computer pump was greatly favored by the public because the customer was able to see at a glance

both the price and the quantity of the gasoline he had purchased. The shift in public demand from noncomputer pumps to computer pumps has been so marked that for several years it has been all but impossible for any gasoline pump manufacturer to continue to engage in such business unless he manufactured computer pumps."

A table is then given showing this shift in sales from non-computer to computer pumps, from 1931 to 1939.

"16. The magnitude of the industry is shown by the fact that there are approximately 1,300,000 gasoline pumps in use in the United States and approximately 100,000 gasoline pumps are sold in the United States each year, by gasoline pump manufacturers.

"17. Prior to 1932, and during the period of time covered by this indictment, numerous applications for letters patent have been filed in the United States Patent Office on computer pumps, computing mechanisms, and improvements on computer pumps and computing mechanisms, and the United States Patent Office has issued numerous patents on such subjects. On or about November 22, 1932, the United States Patent Office issued a patent known as the 'Jauch Patent' on a computer pump. The Jauch Patent was issued by the Patent Office to certain employees of the Wayne Pump Company who immediately assigned the said Jauch Patent to the Wayne Company. Under said

45 Jauch patent and other patents issued as hereinafter described the defendant Wayne has licensed certain other gasoline pump manufacturers to make, use, and sell computer pumps, as hereinafter alleged.

"18. An indispensable element of every computer pump is the computer mechanism. Without a source of supply of such mechanisms a manufacturer cannot make computer pumps.

19. The defendant Wayne, both before and after the issuance of the Jauch patent, entered into certain arrangements and understandings with defendant Veeder, as hereinbefore alleged, whereby the manufacturing and other facilities and patents of the defendant Veeder were to be utilized in the development of a commercially feasible computing mechanism. The defendant Veeder developed such a mechanism and during the period of time covered by this indictment has manufactured such mechanisms and has sold such mechanisms in interstate trade and commerce, for use in computer pumps, only to defendants Wayne, G & B, and Tokheim, and such other manufacturers of gasoline pumps as are permitted by Wayne, G & B, and Tokheim to purchase computing mechanisms from Veeder.

"20. The defendant Veeder manufactures computing mechanisms in the State of Connecticut and sells and ships such mecha-

nisms to gasoline pump manufactures in the States of Indiana, Massachusetts, Pennsylvania, Texas, and other states of the United States where computer pumps are manufactured. Such gasoline pump manufacturers including defendants Wayne, G & B, and Tokheim, sell and ship computer pumps from their plants to customers located in other states of the United States, including customers in the Eastern Division of the Northern District of Illinois.

"21. During the period of time covered by this indictment the Neptune Meter Company (sometimes hereinafter referred to as "Neptune") manufactured computing mechanisms in the State of New York and sold and shipped such mechanisms to numerous manufacturers of gasoline pumps, other than defendants Wayne, G & B, and Tokheim, located in states other than New York, who used such computing mechanisms in the manufacture of computing pumps which were sold and shipped by such manufacturers to customers located in states other than where the computer pumps were manufactured. Such pumps were sold in competition with those manufactured by the defendant Wayne and its licensees, including G & B and Tokheim.

"22. During the same period of time other gasoline pump manufacturers produced computing mechanisms which were used in computer pumps of their own make which were sold and shipped to customers located in states other than where the pumps were manufactured, in competition with the computer pumps manufactured by the defendant Wayne and its licensees, including G & B and Tokheim, and in competition with the computer pumps manufactured by companies purchasing computing mechanisms from Neptune.

46 "23. Since the year 1938, however, the defendant Veeder has been the sole manufacturer in the United States of computing mechanisms used in computer pumps and the only available source of computing mechanisms used by manufacturers in the making of computer pumps.

"24. The defendants Wayne, G & B, and Tokheim, during the period covered by this indictment, have been the three leading manufacturers of gasoline pumps in the United States. In 1939 such defendants manufactured and sold computer pumps constituting 56% of the value of all computer pumps sold in the United States, while Wayne, G & B, and Tokheim, with the other eight manufacturers licensed by Wayne, with the consent of G & B and Tokheim, to buy computing mechanisms from defendant Veeder and make computer pumps, manufactured and sold 100 per cent of the computer pumps made and sold in the United States. In the same year gasoline pumps of all types manufac-

tured by Wayne and its licensees constituted approximately 99 per cent of the value of all gasoline pumps manufactured and sold in the United States. In 1931, prior to the introduction of computer pumps, there were approximately thirty manufacturers of gasoline pumps in the United States.

"25. Most of the computer pumps manufactured by defendants Wayne, G & B, and Tokheim and other manufacturers are sold in interstate trade and commerce to major oil companies and to independent gasoline station operators for installation in gasoline filling stations throughout the United States."

The indictments set out the combination and conspiracy, first in the price-fixing indictment, charging that all of the defendants—

"* * * well knowing all of the facts alleged in this indictment, beginning in or about the year 1932 * * * and continuously thereafter up to and including the date of the presentation of this indictment knowingly have entered into and engaged in a combination and conspiracy to fix, maintain and control arbitrary, artificial and noncompetitive prices for the sale of computer pumps in the aforesaid interstate trade and commerce, which combination and conspiracy, in fact, has been and is now in restraint of trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890 * * * commonly known as the Sherman Act; which combination and conspiracy is now described in further detail, that is to say:"

Thirty separate acts or means are then enumerated which are alleged to be "a part of said combination and conspiracy."

The indictment finally alleges that the defendants entered into the agreements and did the things they combined and conspired to do, and specifies in detail certain overt acts.

The monopoly indictment charges in count one that all of the defendants—

"* * * well knowing all of the facts alleged in this indictment, beginning in or about the year 1932 * * * and continuously thereafter up to and including the date of the presentation of this indictment, knowingly have entered into and engaged in an unlawful combination and conspiracy to monopolize the manufacture and sale of computer pumps in the aforesaid interstate trade and commerce, which combination and conspiracy in fact has been and is now in violation of Section 2 of the Act of Congress * * * commonly known as the Sherman Act; which combination and conspiracy is now described in further detail, that is to say:"

47 Twenty separate acts or means are then enumerated which are alleged to be "a part of said combination and conspiracy."

Count two charges that all of the defendants "knowingly have entered into and engaged in an unlawful combination and conspiracy to monopolize the manufacture and sale of computing mechanisms" in violation of Section 2 of the Sherman Act. Nineteen separate acts or means are enumerated which are alleged to be "a part of said combination and conspiracy."

Demurrers, supported by briefs, have been filed on behalf of all of the defendants, and answering briefs have been filed on behalf of the Government.

The demurrers challenge the sufficiency of the indictments on the ground that they fail to describe the alleged conspiracies and combinations with which defendants are charged so as to inform them of the nature and cause of the accusations against them and enable them to properly prepare their defenses.

The cases are before me now for disposition on these demurrers.

48 SULLIVAN, District Judge, after stating the facts as above:

Two indictments have been returned against these defendants. In indictment No. 32597 they are charged with combining and conspiring "to fix, maintain and control arbitrary, artificial, and noncompetitive prices for the sale of computer pumps" in interstate commerce in violation of Section 1 of the Sherman Act. In indictment No. 32598 defendants are charged with combining and conspiring to monopolize the manufacture and sale of computing mechanisms in interstate commerce, in violation of Section 2 of the Sherman Act. Defendants Wayne Pump Company, G & B, and Tokheim are manufacturers of computer pumps, and defendant Veeder is a manufacturer of computing mechanisms. Computer pumps and computer mechanisms, the subject matter of both the price fixing and the monopoly indictments, are covered by patents issued by the United States.

The indictments set out that the development of gasoline pumps has paralleled the major changes and improvements in the manufacture of automobiles; that from a rather crude beginning the type of gasoline pump in general was improved from time to time; that prior to 1932, however, a pump had not been developed which would automatically calculate and register both the quantities and prices of the gasoline dispensed.

On November 22, 1932, the United States patent office issued to one Jauch, an employee of the Wayne Pump Company, a patent covering the computer pump, which was subsequently assigned to the Wayne Company. The indictments set out that this patent revolutionized the gasoline pump business, and that as soon as computer pumps were placed on the market they superseded all other types of pump, so that by 1939 they represented

over 90% in value of gasoline pumps manufactured and sold in this country.. That the computer pump was greatly favored by the public because the customer was able to see at a glance both the price and quantity of the gasoline he had purchased, and that so great has been the shift in public demand from noncomputer pumps to computer pumps that for several years it has been all but impossible for any gasoline pump manufacturer to continue in business unless he manufactured computer pumps.

Following the grant of the Jauch patent and the commercial development of the computer pump manufactured thereunder, it appears that the Wayne Pump Company granted licenses to G & B and Tokheim to make, use and sell computer pumps. The indictments set out that at a later period, when the computer pump became a success and the public demand for it became great, the Wayne Company granted licenses to eight other pump manufacturers. As owner of the patent the Wayne Company had the right to grant these licenses on its own terms and conditions, just as it had a right to completely exclude all others from making, using or selling computer pumps for the time prescribed in the statute, provided only that in so doing it did not violate any other law.

49 In the case of Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co., 154 Federal, 358, a patentee's rights were challenged under the Sherman Act. In sustaining the patentee's rights Judge Baker (C. C. A. 7th Circuit) said:

"Under its constitutional right to legislate for the promotion of the useful arts, Congress passed the patent statutes. The public policy thereby declared is this: Inventive minds may fail to produce many useful things that they would produce if stimulated by the promise of a substantial reward; what is produced is the property of the inventor; he and his heirs and assigns may hold it as a secret until the end of time; the public would be largely benefited by obtaining conveyances of these new properties; so the people, through their representatives, say to the inventor: 'Deed us your property, possession to be yielded at the end of 17 years, and in the mean time we will protect you absolutely in the right to exclude every one from making, using, or vending the thing patented without your permission.' [Citing cases.] Congress put no limitation, excepting the time, upon the monopoly. Courts can create none without legislating. • • •

Use of the invention cannot be had except on the inventor's terms. Without paying or doing whatever he exacts no one can be exempted from his right to exclude. Whatever the terms, courts will enforce them, provided only that the licensee is not thereby required to violate some law outside of the patent law, like the doing of murder or arson."

In *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, the court said:

"The inventor is one who has discovered something of value. It is his absolute property. He may withhold a knowledge of it from the public, and he may insist upon all the advantages and benefits which the statute promises him who discloses to the public his invention.

"It (a review of prior cases) shows that whenever this court has had occasion to speak, it has decided that an inventor receives from a patent the right to exclude others from its use for the time prescribed in the statute. And for his exclusive enjoyment of it during that time the public faith is forever pledged."

In *Bement & Sons v. National Harrow Co.*, 186 U. S. 70, the owner of the patent granted a license to a manufacturer to manufacture harrows under the patent. The suit against the manufacturer was one to recover damages for a violation of licenses and to restrain further violations. Mr. Justice Peckham, in his opinion, rendered in 1902, said:

50 "But that statute (Sherman Anti-Trust Law) clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and logical conditions imposed upon the assignee or licensee of a patent by the owner thereof restricting the terms upon which the article may be used, and the price to be demanded therefor. Such a construction of the Act, we have no doubt, was never contemplated by its framers.

"The owner of a patented article can, of course, charge such price as he may choose and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article."

In *United States v. General Electric Co.*, 272 U. S. 476, suit in equity was brought by the Government against the General Electric Company and the Westinghouse Electric Company to enjoin them from prosecuting a plan for the distribution and sale of patented electric lamps. The General Electric Company was the owner of patents on tungsten-filament-incandescent lamps, and in granting a license under its patents to the Westinghouse Company it fixed the price at which the Westinghouse Company could sell the patented lamps. After examining various cases on the subject, including *Bement v. National Harrow Co.*, supra, the Supreme Court said that the authority of the *Bement* case "has not been shaken by the cases we have reviewed." In dismissing the Government's bill and sustaining the right of the patentee-

licensee to fix prices and impose other conditions under which the licensee could make, use, and vend the patented article, the court said:

"The patentee may make and grant a license to another to make and use the patented articles, but withhold his right to sell them. The licensee in such a case acquires an interest in the articles made. But if he sells them he infringes the right of the patentee and may be held for damages and enjoined. If the patentee goes further, and licenses the selling of the article, may he limit the selling by limiting the method of sale and the price? We think he may do so, provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly. One of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold. The higher the price, the greater the profit, unless it is prohibitory. When the patentee licenses another to make and vend, and retains the right to make and vend on his own account, the price at which his licensee will sell will necessarily affect the price at which he can sell his own patented goods. It would seem entirely reasonable that he should say to the licensee, 'Yes, you may make and sell the articles under my patent, but not so as to destroy the profit that I wish to obtain by making and selling them myself.'"

In *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, 154 Fed. 358, the Rubber Tire Wheel Company, owner of the Grant patent on rubber tire wheels, had granted a number of licenses under which it exacted royalties, fixed the price at which licensees could sell the patented product, and imposed other terms and conditions. Suit was brought by the licensor to collect royalties from the licensee, and the defense was set up that the license arrangement was unlawful under the Sherman Act. In reversing the lower court, the Circuit Court of Appeals for this Circuit held that the patentee-licensee had the right to fix prices on the patented article and to impose other conditions, and in sustaining the right of the licensor to recover its royalties, Judge Baker said:

"The only grant to the patentee was the right to exclude others, and to have and to hold for himself and his assigns a monopoly, not a right limited or conditioned according to the sentiment of judges, but an absolute monopoly constitutionally conferred by the sovereign lawmakers. Over and above an absolute monopoly created by law, how can there be a further and unlawful monopoly in the same thing. If plaintiff were the sole maker of Grant tires, how could plaintiff's control of prices and output injure the people, deprive them of something to which they have a right?

Is a greater injury or deprivation inflicted, if plaintiff authorizes a combination or pool to do what plaintiff can do directly? To say yes means that substance is disregarded, that mere words confer upon the people some sort of right or interest counter to the monopoly, when by the terms of the bargain the people agreed to claim none until Grant's deed to them shall have matured."

The indictments here charge the defendants' Wayne Pump Company, G & B, and Tokheim with "using the Jauch patent" for the purpose of fixing prices among themselves on the sales of computer pumps, and for the purpose of restricting the manufacture and sale of such pumps. There is no charge that defendants fixed the prices of gasoline pumps generally, or restricted their manufacture and sale. They are charged only with fixing the prices of computer pumps, a right which the Wayne Pump Company already had under the statutory monopoly granted by the Government when its patent was issued. What is meant by the phrase "used the Jauch patent" is not quite clear. If the defendants did more than enter into ordinary patent license agreements, under the terms of which the Wayne Pump Company, as owner of the patent, licensed the others to manufacture computer pumps, and fixed the prices at which the pumps should be sold; or if the Government claims that these defendants were involved in some offense under the Sherman Act other than the exercise of a patent monopoly, then such offense should be set out clearly in the indictments.

While ownership of the patent gives to the patentee a complete monopoly within the field of his patent, it of course does not give him any license to violate the provisions of the Sherman Act or of any other law. Under his monopoly he may not use his patent as a pretext for fixing prices on an unpatented article of commerce; nor fix the resale price on his patented article; nor make use of tying clauses." In the case of *United States v. Standard Sanitary Manufacturing Co.*, 226 U. S. 20, the patent owner and its licensees entered into a scheme for fixing prices on a common article of commerce—unpatented bath tubs—and then by a pretended use of a process patent attempted to evade the Sherman Act. This is obviously not the instant case, and the indictments do not allege that there was any understanding or agreement among the defendants to use the patent to fix prices on any unpatented article. In fact there is no allegation that there was any understanding or agreement among the defendants at all, aside from the allegation that they "knowingly have entered into and engaged in a combination and conspiracy to fix and maintain noncompetitive prices and to monopolize the manufacture and sale of computer pumps and computing mechanisms, by the doing of the things set out." The things

and means than set out are things which I believe the patentee, under its patent already had the right to do.

The Government argues that the instant case and the Bath Tub Case have one basic common theme, that is conspiracy, joint action, agreement to use the patent for the purpose of fixing prices among themselves. The difficulty is that the Government fails to set out any identifying facts to show that the Wayne Pump Company and its licensees did anything more than the law permitted them to do under the monopoly granted by the patent. How they took joint action or entered into joint agreements to use the Jauch patent to achieve the alleged illegal objectives, or how they went outside the monopoly granted to the patentee and its licensees, is nowhere set out in the indictments.

The indictments also allege, as another of the means used to accomplish the illegal objectives, that the defendant Wayne Pump Company, with the consent of G. & B. and Tokheim, approached gasoline pump manufacturers purchasing computing mechanisms from Neptune, and other gasoline pump manufacturers using computing mechanisms of their own make in the manufacture of computer pumps, and attempted to induce each of such manufacturers to accept a license under the Jauch patent; and that the Wayne Pump Company, with the authorization of G. & B. and Tokheim, would issue such license to each of such manufacturers on terms securing to the defendants control of all of the new licensee's patents on computing mechanisms and computer pumps and of the licensee's prices for the sale of computer pumps. Also that the defendant Wayne, with the consent of G. & B. and Tokheim, attempted to compel Neptune, the sole manufacturer and seller of computing mechanisms other than Veeder, to forever acknowledge the validity of the Jauch patent, to submit all patents on computer pumps and computing mechanisms owned or controlled by Neptune to uses determined by Wayne, and to refrain from manufacturing or selling computing mechanisms except to customers approved by Wayne, G. & B. and Tokheim.

Again it is not clear what is meant by the allegation that defendants attempted to compel Neptune to submit all patents owned or controlled by it on computer pumps "to uses determined by Wayne." With the issuing of the Jauch patent the Wayne Company dominated the computer pump field. In fact the indictments allege that the public demanded the new invention and that nineteen gasoline pump manufacturers ceased to do business because they did not have licenses to manufacture the computer pump. The entire world, other than the Wayne Company, was excluded for seventeen years from making, using, or selling com-

puter pumps, or any combination machine or unit which embodied the five elements described by Judge Slick in the case of Wayne Company v. Anchor Oil Company, 20 Fed. Supp. 745, as follows:

"(1) A source of liquid supply. (2) A pump; the suction side of which is connected to said source of liquid supply. (3) A meter. (4) A registering means operated by said meter for registering the liquid dispensed and the cost thereof. (5) Means for changing the relation between the cost operating portion whereby the unit cost per unit amount dispensed may be varied."

53 Judge Slick held the Jauch patent valid, and that the

Neptune Company (manufacturer of computing mechanisms which were ultimately sold to the Anchor Company) was an infringer of the Wayne patent. The Neptune Company and the Anchor Oil Company were thereafter precluded from manufacturing, selling or using computer mechanisms for computer pumps, and all gasoline pump manufacturers who purchased computing mechanisms from them and used the same in the manufacture of computer pumps would also be infringers. Under these conditions I fail to see how defendants aided in carrying out an unlawful conspiracy because defendant Wayne Company, with the consent of G. & B. and Tokheim, approached gasoline pump manufacturers, who had purchased computer mechanisms from Neptune and other manufacturers, and attempted to induce them to accept licenses under the Jauch patent. If in attempting to induce these manufacturers to accept such licenses, the Wayne Company, or any other of the defendants, made use of unlawful means, then those facts should be set out in the indictments. The indictments complain that an indispensable element of every computer pump is the computing mechanism, and without a source of supply of such mechanisms a manufacturer cannot make computer pumps. Under Judge Slick's decision, even with a supply of computer mechanisms no manufacturer can use them in the manufacture of computer pumps, save only as he is licensed by the Wayne Company to do so. Judge Slick held that the Jauch patent covered a meter and a registering means operated by said meter for registering the liquid dispensed and the cost thereof. It therefore follows that everyone making, using or selling this computer mechanism in connection with a computer pump would be an infringer.

The indictment also charges as one of the means or devices used in bringing about the combination or conspiracy that "the defendants Veeder, G. & B. and Tokheim acknowledge the validity of the Jauch patent." When G. & B. became licensees they were estopped from denying the validity of their licensor's patent,

and I see nothing illegal or unlawful in the licensor requiring of them that they acknowledge the validity thereof, especially, as here, where its validity had already been established by the United States District Court of Indiana. Agreements which provide that licensees recognize the validity of the patent beyond the termination of the license are valid agreements. *United Shoe Machinery Co. v. Caunt*, 134 Fed. 239; *Eskimo Pie Corp. v. National Ice Cream Co.*, 20 Fed. (2) 1003, 26 Fed. (2) 901. If any unlawful means were used in securing this acknowledgment, then the indictments should set them out clearly enough for defendants to meet these charges. Another means or device complained of in the indictments is that defendants determined jobbers resale prices for computer pumps, refused to sell computer pumps to any jobber failing or refusing to adhere to such resale prices, and that they eliminate discounts to all jobbers in the event of a general failure by jobbers to adhere to the said resale prices.

In a long line of decisions the United States Supreme Court has held that attempts to regulate future prices or future marketing of a patented article after complete sale by the owner thereof, were not valid exercises of the patent monopoly, and amounted to unlawful restraint of trade, invalid at common law, and, so far as interstate commerce was concerned, invalid under the Sherman Anti Trust Act of July 2, 1890. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373; *U. S. v. Schraders Sons*, 252 U. S. 85; *Boston Store v. American Graphophone Co.*, 246 U. S. 8; *Straus v. Victor Talking Machine Co.*, 243 U. S. 490.

54. The charge in the instant indictments is that "the said defendants determine jobbers' resale prices for computer pumps, refuse to sell computer pumps to any jobber failing or refusing to adhere to such resale prices, and eliminate discounts to all jobbers in the event of a general failure by jobbers to adhere to said resale prices." However, no facts are set out to show that the Wayne computer pumps were sold through jobbers, nor are the names of any specific jobbers given with whom these defendants carried on negotiations wherein the resale price of computer pumps was determined. In the case of *United States v. Colgate & Co.*, 253 Fed. 522, affirmed by the United States Supreme Court in 250 U. S. 300, defendant was indicted for conspiracy to fix the resale price at which wholesale and retail dealers might sell its product, the reference being to wholesalers and retailers generally, as is the reference in the instant indictments to jobbers generally. In the *Colgate* case the court said:

"It does not seem to the court that the alleged offense with which defendant is charged is stated, and set forth with that degree of accuracy and certainty required in criminal pleading.

The facts in no particular combination, against any one set of wholesalers or retailers alleged to have been in combination with the defendants, are given, but merely that assurances and promises were made by the wholesale and retail dealers, doing business with the defendant throughout the United States and the Eastern District of Virginia, that its products would not be resold at retail other than at prices fixed by the defendant. This language is too general, and the defendant has the right at least to be informed of some one particular infraction of the law that it is claimed it has committed. It would be impossible to intelligently prepare a defense or answer to this indictment, as it involves defendant's dealings with its wholesale and retail customers throughout the territory named, covering a period of three years. This is too indefinite, and there ought to be no difficulty, if such conditions exist, as set forth in the indictment, to name some specific instance of the alleged combination and state the same in detail."

So in the case at bar, if these conditions exist, the Government should have no difficulty in setting forth at least one specific instance of where defendants determined the resale price at which jobbers might resell computer pumps. If this condition does exist, surely the Government must be in possession of the facts, and they should be set out in the indictments, so as to reasonably inform defendants of the offense with which they are charged.

"Tying clauses" are also prohibited by Section 3 of the Clayton Act (U. S. C. A. Title 15, Sec. 14) but no facts are set out in the present indictments which charge defendants with the creation of a monopoly by means of "tying clauses."

The Government in its argument insists that competing patents are here involved, and that a monopoly of competing patents was acquired by some of the defendants in furtherance of the plan to carry out the conspiracy, but the indictments set out no facts whereby to identify these competing patents, nor in what manner nor by whom such monopoly in them was acquired. The Government also insists that not one but many patents on computer pumps, computing mechanisms and improvements
55 thereon were used to achieve the illegal purpose or conspiracy, but again the indictments are silent as to the identity of the other patents side from the Jauch patent issued in November 1932. The indictments set out that changes in types of gasoline pumps have paralleled the major changes and improvements in the manufacture of automobiles; and that upon the advent of the computer pump it was so favored by the public that there was a marked shift from noncomputer pumps to the computer type, and that it thereupon became impossible

for any gasoline pump manufacturer to continue to engage in such business unless he manufactured computer pumps. The Jauch patent dominated the computer pump field, and gave to its owners the right to exclude therefrom all others. As the indictment points out, the computer pump was so favored by the public that there was a definite shift to this type of pump, and it thereupon became impossible for any manufacturer to continue to engage in such business unless he manufactured the computer type of pump. This is the very thing they could do only with the permission of the Wayne Company and upon its terms and conditions. As said before, upon the issuance of the Jauch patent by the United States Government, the owner thereof was granted an absolute monopoly on the manufacture and sale of computer pumps at any price it chose to fix for same. Over and above this complete monopoly, I fail to see how the owner of the patent and its licensees could engage in any further and unlawful monopoly, unless they went outside of the domain of the patent and were guilty of doing things which the law does not permit them to do, and no factual allegations are set out in the indictments to show that they did this. I have read the indictments in their entirety several times, and in the various means, acts and devices whereby the combinations and conspiracies are alleged to have been accomplished, I do not find that defendants are charged with the doing of anything which they did not already have the right, under the patent, to do. The fixing of prices and monopoly to manufacture and sell computer pumps, here complained of, were the very rights which the Wayne Company and its licensees enjoyed by reason of ownership of the patent. The courts have been unanimous in this construction of the rights of a patentee. If, in the interest of public policy, the monopoly which the patent laws confer upon an inventor seem too broad, redress must come from Congress, not from the courts.

It is fundamental that in every indictment the defendant is entitled to be informed with such definiteness and certainty of the accusations against him as will enable him to make his defense, and avail himself of acquittal or conviction in any further prosecution for the same offense. Having in mind that the subject matter of the instant indictments is protected by a patent, I am of the opinion that the defendants here have not been furnished with such definite and particular allegations of fact as will meet this test. The charges are much too general. They do not adequately describe the nature of the alleged unlawful conspiracy agreements or arrangements which defendants are accused of having made, nor show how the defendants became

parties thereto, nor how they collaborated in doing the unlawful things; nor set out any unlawful means whereby the unlawful objectives were accomplished.

Believing as I do, for the reasons heretofore stated, that the indictments are insufficient, the demurrers thereto will be sustained.

Enter.

February 17, 1942.

(Sgd.) PHILIP L. SULLIVAN,

Judge.

56 In the District Court of the United States, Northern
District of Illinois, Eastern Division

Present: The Honorable PHILIP L. SULLIVAN, Judge

No. 32597

UNITED STATES OF AMERICA

vs.

THE WAYNE PUMP COMPANY, ET AL.

Order sustaining demurrers

Feb. 24, 1942

This day again comes the United States by the United States Attorney come also the defendants in their own proper persons and by their attorneys and the Court having heretofore heard the arguments of counsel on the defendants' demurrers to the indictment filed herein against them and being now fully advised in the premises it is

Ordered that the demurrers to said indictment be and the same are hereby sustained.

57 In District Court of the United States

[Title omitted.]

Petition for appeal

Filed March 26, 1942

The United States of America, plaintiff herein, states that on the 24th day of February 1942, demurrers to the indictment herein, interposed by the defendants named therein, were sustained by this Court. The plaintiff, feeling aggrieved by the rulings of the Court in sustaining said demurrers, prays that it

be allowed to appeal to the Supreme Court of the United States for a reversal of said order and judgment, insofar as it sustains the demurrers to the indictment, and that a transcript of the record in this cause, duly authenticated, be sent to the Supreme Court of the United States.

The petitioner presents to the Court herewith a statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause.

(s) DANIEL B. BRITT,

Daniel B. Britt,

Special Assistant to the Attorney General.

(s) J. ALBERT WOLL,

J. Albert Woll,

United States Attorney.

Northern District of Illinois, Eastern Division.

85 In District Court of the United States

[Title omitted.]

Assignments of error

Filed March 26, 1942

The United States of America, having filed its petition for appeal herein, now states that as a result of the action taken by this Court in sustaining the several demurrers to the indictment in this cause there has intervened in said cause manifest error to the prejudice of the United States in the following respects:

1. The Court committed material error against the plaintiff in sustaining the several demurrers interposed to the indictment in the above entitled cause by the defendants named thereon;

2. The Court committed material error in sustaining such demurrers on the grounds and for the reasons as stated in the Opinion of the Court:

First, that the objective of the conspiracy as set out in the indictment is one which a patentee and those combining with him may lawfully entertain and use under the patent laws of the United States, and therefore does not constitute a violation of the Sherman Act.

Second, that the means set out for effectuating the objective charged in the indictment are means which a patentee and those combining with him may lawfully entertain and use under the patent laws of the United States, and therefore do not constitute violations of the Sherman Act.

86 Third, that the objective of the alleged conspiracy together with the means set out in the indictment for effect-

tuating such objective are aims and means which a patentee and those combining with him may lawfully entertain and use under the patent laws of the United States, and therefore do not constitute violations of the Sherman Act.

The United States of America therefore respectfully prays that the action taken by this Court in sustaining the said demurrers, and the ruling of the Court entering judgment in favor of the aforesaid defendants on said demurrers, be set aside and held for naught.

(S) DANIEL B. BRITT,
Daniel B. Britt,

Special Assistant to the Attorney General.

87 In District Court of the United States

[Title omitted.]

*Order allowing appeal to the Supreme Court
of the United States*

Filed March 26, 1942

This cause having come on this day before the Court on petition of the United States of America, praying for the allowance of an appeal to the Supreme Court of the United States for a reversal of the order and judgment herein sustaining demurrers to the indictment interposed by the defendants named therein, and requesting that a duly authenticated copy of the record of this cause be transmitted to the Clerk of the Supreme Court of the United States; the Court having heard and considered said motion, together with petitioner's statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause, the same having been duly filed with the Clerk of this Court.

It is therefore ordered and adjudged, that the United States of America be and it is hereby allowed an appeal to the Supreme Court of the United States from the order and judgment of this Court sustaining the demurrers of the defendants to the indictment herein; that a duly authenticated copy of the record in this cause be transmitted to the Clerk of the Court, and that a citation be issued as provided by law.

88 It is further ordered, that the United States of America be and it is hereby allowed a period of forty days from the date hereof within which to file and docket said appeal in the Supreme Court of the United States.

Dated at Chicago, Illinois, this 26th day of March 1942.

(S) PHILIP L. SULLIVAN,
United States District Judge.

46 UNITED STATES VS. THE WAYNE PUMP CO. ET AL.

92 [Citation in usual form, filed March 26, 1942, omitted in printing.]

93 In District Court of the United States

[Title omitted.]

Praeceptum for transcript of record

Filed March 26, 1942

To the CLERK, *United States District Court,*

Northern District of Illinois, Eastern Division:

The appellant hereby directs that, in preparing the transcript of the record in the above-entitled cause for its appeal to the Supreme Court of the United States, you include the following:

1. Docket entries and minute entries showing return of the indictment, filing of demurrers, and entry of order and judgment sustaining demurrers.

2. Indictment.

3. Demurrers.

4. Opinion.

5. Order and judgment sustaining demurrers.

6. Petition for appeal to the Supreme Court of the United States.

7. Statement of jurisdiction of the Supreme Court of the United States.

8. Assignments of error.

9. Order allowing appeal.

10. Proof of service on appellees of petition for appeal, order allowing appeal, assignments of error, and statement of jurisdiction.

diction.

94 11. Citation.

12. Praeceptum.

DANIEL B. BRITT,

Daniel B. Britt,

Special Assistant to the Attorney General.

J. ALBERT WOLL,

J. Albert Woll,

United States Attorney,

Northern District of Illinois, Eastern Division.

95 [Clerk's certificate to foregoing transcript omitted in printing.]

97

In Supreme Court of the United States

Statement of points and designation of record to be printed

Filed May 8, 1942

I

United States of America, appellant, states that in its brief and oral argument on its appeal in the above-entitled cause it will rely upon the points stated in its assignment of errors therein.

II

The entire record in this cause as filed in this Court is necessary for consideration of the points stated by appellant, and the entire transcript of record as transmitted by the Clerk of the District Court should be printed by the Clerk of this Court.

CHARLES FAHY,
Solicitor General.

Service acknowledged May 4th, 1942.

ARTHUR S. LYTTON, HAROLD F. MCGUIRE & JAMES M. CARLISLE,
By PB

Counsel for appellees Veeder-Root, Inc.,

G. H. Anthony, and J. H. Chaplin.

98

JAMES H. WINSTON,

JOHN C. SLADE,

GEORGE W. OTT,

*Attorneys for Gilbert & Barker Manufacturing Company
and S. C. Hope, Appellees.*

EDWD. R. JOHNSTON,

By: WM. M. G.

CHAS. L. BYRON,

HOWARD SOMERVELL,

*Attorneys for the Wayne Pump Company and
B. F. Geyer, Appellees.*

BALLARD MOORE, LOUIS F. NIEZER, HAROLD W. NORMAN,

*Attorneys for Tokheim Oil Tank and Pump Company,
Appellees.*

BARRY GILBERT,

*Attorney for Gasoline Pump Manufacturers Association
and G. Denny Moore, Appellees.*

[File endorsement omitted]

48 UNITED STATES VS. THE WAYNE PUMP CO. ET AL.

99 Supreme Court of the United States

Order postponing further consideration of question of jurisdiction

May 25, 1942

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court in this case is postponed to the hearing on the merits.

Mr. Justice Jackson took no part in the consideration or decision of this question.

[Endorsement on cover:] File No. 46499. D. C. U. S., N. Illinois. Term No. 81. The United States of America, Appellant vs. The Wayne Pump Company, Gilbert and Barker Manufacturing Company, Tokheim Oil Tank and Pump Company, et al. Filed April 24, 1942. Term No. 81 O.T. 1942.

